Supreme Court, U.S.
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CASE NO. 82–815

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

In Re: WILLIAM LEE KOVACS,
Debtor

STATE OF OHIO,
Petitioner-Appellant,

v.

WILLIAM LEE KOVACS, d/b/a/, B & W Enterprises; Hamilton Industrial Real Estate Company; Resort Rentals; and Whitco Enterprises,
Respondent-Appellee.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONER STATE OF OHIO

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ARGUMENT

I. BECAUSE THERE EXISTS A CONTINUING LIVE CONTROVERSY BETWEEN THE PARTIES CONCERNING WHICH THIS COURT MAY GRANT THE STATE OF OHIO SPECIFIC RELIEF, THIS CASE IS NOT MOOT.

In his brief in opposition to Ohio's petition for certiorari, Respondent Kovacs argues that the State's petition should be denied because the bankruptcy and district courts' recent determinations on Ohio's adversary complaint concerning the dischargeability of the state court injunctions render this case moot. (Kovacs' Br. 4-6)*. In light of the interrelationship between the dischargeability proceeding below and the stay proceeding which is the subject of the petition to this Court, the State is incredulous that Kovacs would make such a blatantly misleading suggestion to this Court. As will be established below, there are three ways in which a live case or controversy clearly still exists between Ohio and Kovacs.

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*It must be clarified that the bankruptcy court *has not* issued a final discharge of Kovacs thereby terminating the entire bankruptcy case, *In re Kovacs*. Rather, the bankruptcy and district courts have merely ruled on an adversary proceeding within the bankruptcy case. The actual bankruptcy case, *In re Kovacs,* remains pending before the bankruptcy court. Indeed, within the past month Kovacs has filed a new adversary complaint in the bankruptcy court against the state court receiver in which the same issues as in the case at bar will again be present. *See* Supplemental Appendices to this reply brief.

A. Since The District Court's Recent Determination Of Dischargeability Was Based Upon The Sixth Circuit's Decision Which Is The Subject Of Ohio's Petition As "Law Of The Case", There Remains A Live Controversy Because This Court's Granting Of Ohio's Petition And Reversal Of The Sixth Circuit's Decision Below Would Require Reversal Of The District Court's Determination Of Dischargeability.

As Respondent Kovacs argues in his brief in opposition to Ohio's petition, a case is still a live controversy if there exists a "real and substantial controversy admitting of specific relief through a decree of a conclusive character". *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). Due to the unique nature of the recent decision of the United States district court that Kovacs' obligation to comply with the state court's injunctions obtained against him by Ohio is dischargeable in bankruptcy, the question framed by Ohio's petition for certiorari remains a live, and, indeed, more vital than ever, controversy between the parties.

Immediately after the bankruptcy court invoked against the State the automatic stay which is the subject of Ohio's petition to this Court, Ohio filed in the bankruptcy court an adversary complaint alleging that the injunctions it had obtained in bankruptcy were not dischargeable because the injunctions were neither "claims" nor "debts" as defined in 11 U.S.C. Section 101(4) and (11) which could be discharged pursuant to 11 U.S.C. Section 727(b). The State claimed that since it had no right to payment as an alternative to the performance of the injunctions, Kovacs' obligation to perform the injunctions did not fit within the definition of "claim" provided at 11 U.S.C. Section 101(4)(B).

The district court, in its recent "opinion affirming bankruptcy court's determination of dischargeability" (attached as Appendix C to Kovacs' Brief In Opposition To Petition For Writ Of Certiorari), seemed to accept the State's argument. The court agreed with Ohio that an alternative right to payment was necessary in order to discharge an equitable obligation. The court further agreed that Kovacs had not established the existence of such an alternative right to payment. Those conclusions by the district court should have resulted in a decision in the State's favor that the injunctions were not dischargeable. The district court, however, went on to declare:

> Nevertheless, we conclude that, *under law of the case principles,* we must accept the determination of the Sixth Circuit that the State was seeking what amounted to a money judgment against Kovacs. *In re Kovacs, supra.* (*See* Resp. Kovacs' Br. at 15(a)).

Thus, the district court held that the Sixth Circuit's previous decision that Ohio was attempting to enforce a money judgment not an injunction was "law of the case" requiring a determination of dischargeability. Since that previous decision of the Sixth Circuit is the very same decision of which Ohio is seeking review by its petition for certiorari, Kovacs' claim that there is no "specific relief which could be granted the Petitioner in the instant case" (Resp. Kovacs' Br. at 6) is clearly incorrect. By granting Ohio's petition and reversing the Sixth Circuit's previous erroneous determination that Ohio is enforcing a money judgment, the law of the case principle would require reversal of the district court's decision holding the injunctions dischargeable. Thus, the State would be free to resume its efforts to enforce the injunctions against Kovacs. Therefore, in light of the "law of the case" basis for the district court's determination of dischargeability, this case is far from moot. Indeed, this case takes on increased importance and vitality because a decision in

this case can have sweeping implications on the dischargeability of Kovacs' obligation to comply with the injunction to abate the environmental catastrophe he created.

B. This Case Still Presents A Live Controversy Because The District Court's Determination Of Dischargeability May Be Reversed By The Sixth Circuit.

On October 4, 1982, the State filed a timely appeal to the Sixth Circuit from the district court's determination of dischargeability. In its brief filed in the Sixth Circuit on December 6, 1982, Ohio has pointed out that it is a well-established rule of law that the "law of the case" doctrine does not apply to all matters which could have been decided in a case but rather is limited strictly to those issues actually decided. *Quern v. Jordan,* 440 U.S. 332, 347, fn. 18 (1979); *Hartford Life Insurance Co. v. Blincoe,* 255 U.S. 129, 136 (1921); *Wells Fargo R. Co. v. Taylor,* 254 U.S. 175 (1920).

In addition, Ohio also has informed the Sixth Circuit that the decisions of all three courts leading up to and including *In re Kovacs,* 681 F.2d 454 (6th Cir. 1982), specifically refused to address the dischargeability issue. The bankruptcy court, when determining that the automatic stay applied against Ohio, clearly stated:

> The State suggests that its effort in the Butler County Common Pleas Court should not or cannot be stayed because the duties of Kovacs arising under the Stipulation and Judgment Entry of July 18, 1979 are non-dischargeable. The State thus brings us to an interface between the stay provisions of the Bankruptcy Code 11 U.S.C. Section 362 and the dischargeability section, 11 U.S.C. Section 523.

> *While we had earlier in our decision accepted for purposes of argument that the State is proceeding on a non-dischargeable obligation, we will not here decide that question on the merits.* Bankruptcy Rule 701(7) expressly provides that the determination of the dischargeability of a debt is to be determined in an adversary proceeding. (Emphasis supplied.) (App. D at A-23-24).

When that decision was appealed to the District Court, the District Court also refused to address the State's non-dischargeability argument:

> In the briefs and on oral argument, there was much discussion of whether the debtor's obligations under the 1979 judgment of the Butler County Common Pleas Court are dischargeable in bankruptcy. *However, a determination of this issue is not necessary to the issue before us.* Both parties at oral argument agreed that a motion to determine dischargeability is pending in the bankruptcy court. (Emphasis supplied.) (App. C at A-14).

Thus, since the "law of the case" doctrine cannot be applied to issues which were not decided in a previous decision and the dischargeability issue was not addressed in any of the decisions leading up to and including *In re Kovacs, supra,* there is a substantial likelihood that the district court's reliance upon that doctrine to justify its determination that the state court injunctions are dischargeable will be reversed. When that happens, the question of the statutory stay which was held to be applicable to Ohio regardless of the dischargeability of Kovacs' obligation to comply with the State court injunc-

tions will still be in issue. Therefore, this case clearly is not moot and the petition should not be denied on the grounds of mootness.

C. The Issue Concerning Whether Ohio Is Attempting To Enforce A Money Judgment Is Capable Of Repetition, Yet Respondent Kovacs Seeks To Employ The Mootness Doctrine To Evade This Court's Review Of That Issue.

Contrary to the claim of Respondent Kovacs on page 6 of his brief that the facts of this case are so unique that there is little likelihood of repetition, the dischargeability decision of the district court below demonstrates that the identical facts and the identical issue of whether Ohio is enforcing a money judgment are at issue in that case. Indeed, as the district court's opinion notes (Kovacs' Br. at 15(a)), Kovacs is making the same "Ohio should be estopped to deny that it is enforcing a money judgment" argument in that case as it made in the present case. Thus, it is appalling that Kovacs would attempt to mislead this Court concerning the likelihood of repetition of the issue when, at the very same time, he is pressing the identical argument based on identical facts in another proceeding.

Furthermore, shortly before Thanksgiving, Kovacs filed an adversary complaint in the bankruptcy court against the receiver appointed in the state court to implement the injunction the State obtained against Kovacs. (*See* Appendix to this reply brief). In that complaint, Kovacs seeks to recover from the receiver many of the assets which the receiver has employed to attempt to complete the Chem-Dyne site cleanup. The same exact issue presented in the case at bar is certain to arise in that case.

Thus, while Kovacs presses in two other proceedings the identical argument he makes in this case based upon the identical facts in this case, he argues in this case that the issue is moot and there is little likelihood that the question will be repeated. Clearly, Kovacs' contention is nothing more than a transparent attempt to evade this Court's review of the error of his position. *Roe v. Wade,* 410 U.S. 113, 125 (1973).

Therefore, since the facts and issue presented by the case at bar are directly at issue in two related adversary proceedings which are still ongoing in the same bankruptcy case, this case is far from moot. There is still a live and vigorous controversy between Ohio and Kovacs. As a result, Kovacs' mootness argument should be rejected.

II. RECENT DECISIONS AND THE AMICUS CURIAE BRIEFS OF SEVENTEEN STATES AND THE SOLICITOR GENERAL OF THE UNITED STATES DEMONSTRATE THAT THIS CASE PRESENTS A SERIOUS QUESTION OF FEDERAL LAW WHICH THIS COURT SHOULD ADDRESS.

Respondent Kovacs' claim that no significant question of federal law is present in this case has a hollow ring in light of the recent developments reflected in the *amicus curiae* briefs from sixteen states and the Solicitor General of the United States.* To the contrary, those recent developments confirm the fears expressed by Ohio in its petition for certiorari. (*See* Petition, p. 13).

*While Pennsylvania's brief lists fourteen other states which have joined it, Ohio has been informed that Colorado intends to file a separate statement with this Court indicating that it joins in Pennsylvania's brief.

In less than six months since the Sixth Circuit's decision in the case at bar, the "mandatory injunctions are really money judgments" rationale of that case has been followed by two other federal courts to the great distress of Pennsylvania, New Hampshire, and the United States.

Indeed, as those recent decisions indicate, if this Court were to acquiesce in the intellectual dishonesty of the Sixth Circuit's decision below, there is virtually no limit to the havoc which bankruptcy courts can wreak upon police power enforcement actions. As even a quick review of the Butler County Court of Common Pleas' July 18, 1979 Stipulation and Judgment Entry discloses, the orders contained therein are injunctions, not a money judgment. Yet, by unlawfully employing the device of estoppel, the courts below have performed an act of judicial alchemy to allegedly transform the injunctions into a money judgment. Once the intellectual dishonesty of calling an elephant a mouse is accepted, it is only a short step to holding states in contempt of the statutory stay and transferring state enforcement actions from state courts to bankruptcy courts as in the *Penn Terra* case or sheltering a corporate giant like Johns-Manville from its obligation to clean up a hazardous asbestos disposal site when there is no other source of funds as the district court of New Hampshire did in the Johns-Manville litigation. More to the point, once the distinction between injunctions and money judgments is obliterated by "judicial interpretation" in the manner below, the entire Congressional intent to limit the statutory stay to those circumstances explicitly defined in the statute is defeated.

As indicated by the states which have joined in the *amicus* brief, the issue presented by this case is important to every geographic region of the country: the West (California); the Mountain States (Idaho, Colorado and New Mexico); the Southwest (Oklahoma); the South (North Carolina and South Carolina); New

England (Vermont and Connecticut); the Middle Atlantic States (New York, Pennsylvania and West Virginia); and the Midwest (Wisconsin, Missouri, Illinois, Indiana and Ohio); and the United States government itself. Seldom have all of these different groups spoken with one voice: the Sixth Circuit's erroneous use of estoppel to transform an injunction into a money judgment is a disaster to police power enforcement efforts and compels this Court's attention.

III. CONTRARY TO KOVACS' MISLEADING FACTUAL ALLEGATIONS, THIS CASE INVOLVES CONTINUING VIOLATIONS OF OHIO LAW AND THUS KOVACS' ATTEMPT TO RECONCILE THE CONFLICT BETWEEN THE DECISION IN THE CASE AT BAR AND A DECISION BY THE FIFTH CIRCUIT IS UNSUCCESSFUL.

Kovacs' brief is permeated by severe factual distortions concerning his claim that there are no continuing violations of state law involved in this case.* Kovacs advances the simplistic notion that since the appointment of the receiver removed him from the control of the Chem-Dyne site, the violations have stopped. While it is true that the appointment of a receiver stopped Kovacs

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*While not directly related to the question of continuing violations, one of Kovacs' grosser distortions is his claim on page 7 of his brief that the record contains no evidence that Kovacs' efforts could be of any benefit to the cleanup effort. The bankruptcy court stayed the hearing in the state court which was intended to determine the extent to which his efforts could assist the receiver. Thus, since the bankruptcy court's stay prevented Ohio from developing such evidence, obviously that evidence is not in the record.

from committing additional future violations by accumulating an increased volume of illegally stored hazardous materials, the appointment of the receiver alone did nothing to abate the continuing violations resulting from Kovacs' past unlawful conduct. Indeed, the uncontroverted testimony offered by the State before the bankruptcy court was directly the opposite of what Kovacs argues to this Court.

The testimony before the bankruptcy court of the expert witnesses from U.S. EPA and Ohio EPA and the state court receiver all concerned conditions on the Chem-Dyne site since the appointment of the receiver and after Kovacs had ceased bringing additional materials on the site. The testimony established: that some of the materials previously brought on the site by Kovacs remained in open pits emitting hazardous air pollution; that a large volume of the materials Kovacs previously brought on-site remained in leaky tanks and drums slowly but surely releasing their hazardous contents to the environment and causing additional water pollution; that other materials remained stored in such a manner as to present a fire hazard and a potential for explosions in the middle of an otherwise residential area. Thus, the whole point of the state court order requiring Kovacs to remove all the materials from the Chem-Dyne site is that their removal was necessary to abate all continuing violations which resulted from Kovacs' previous unlawful conduct.

It is the *continuing* violations at Chem-Dyne which place the Sixth Circuit's holding below squarely in conflict with the Fifth Circuit's decision in *Securities Exchange Commission v. First Financial Group of Texas,* 645 F.2d 429 (5th Cir. 1981). The Fifth Circuit held that the automatic stay does not apply to interfere with the appointment of a receiver to comply with an injunction abating continuing violations. *Id.* at 437. The Sixth

Circuit's refusal below to allow the State to require Kovacs to assist the receiver in the abatement of the continuing violations resulting from his past unlawful conduct thus creates a direct conflict between the circuits. Therefore, the Court should grant Ohio's petition.

CONCLUSION

Because of the continuing controversy between Kovacs and Ohio concerning whether Ohio is attempting to enforce an injunction rather than a money judgment, this case is not moot. Furthermore, in light of the *amicus* briefs from seventeen other states and the Solicitor General, and in light of recent lower court decisions following the holding below, the question presented concerning the interference by bankruptcy courts with the implementation of mandatory injunctions obtained in police power enforcement actions should be addressed by this Court. Thus, Ohio's petition should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that three copies of this reply brief of petitioner State of Ohio were mailed pursuant to Supreme Court Rule 28.3 by United States mail, first-class postage prepaid, this _____ day of _____ _____ to John A. Garretson, 118 S. Second Street, Hamilton, Ohio 45011, Harry M. Hoffheimer, 900 Tri-State Building, Cincinnati, Ohio 45202, E. Hanlin Bavely, 604 Tri-State Building, Cincinnati, Ohio 45202, James D. Morris, Assistant Counsel, Pennsylvania Department of Environmental Resources, Suite 1200, 1315 Walnut Street, Philadelphia, Pennsylvania 19107, The Solicitor General of the United States, United States Department of Justice, Washington, D.C. 20530.

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SUPPLEMENTAL APPENDICES

APPENDIX 1

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:

WILLIAM LEE KOVACS, et al.,
Debtor

WILLIAM LEE KOVACS
P. O. Box 2791
Toledo, Ohio 43606

and

MYRNA KOVACS
P. O. Box 2791
Toledo, Ohio 43606
Plaintiffs

v.

JACK A. ZETTLER
15 North Third Street
Hamilton, Ohio 45011
Defendant

Bankruptcy Case No. 1-80-01499
Adversary File No. _____

COMPLAINT FOR TURNOVER ORDER
(11 U.S.C. Sections 323, 542)

1. On July 17, 1980, plaintiff William Lee Kovacs filed a petition seeking relief under Chapter 11 of the United States Bankruptcy Code.

2. On September 2, 1980, the above referenced proceedings were converted pursuant to 11 U.S.C. Section 1112(a) to proceedings for relief under Chapter 7 of the United States Bankruptcy Code.

3. Plaintiff Myrna Kovacs is the spouse of plaintiff William Lee Kovacs.

4. Defendant Jack A. Zettler was appointed receiver of Chem-Dyne Corporation, Spray-Dyne Corporation, Trans Environmental Corporation, K. O. I. Petroleum Company, Inc., Whitco Enterprises, Inc., B & W Enterprises, Hamilton Industrial Real Estate Company, and William Lee Kovacs pursuant to an order of the Court of Common Pleas of Butler County, Ohio, entered on February 4, 1980.

COUNT I

5. At the time of the filing of plaintiff's petition for relief under the United States Bankruptcy Code, defendant Jack A. Zettler was in possession of various assets of plaintiff William Lee Kovacs, including the following:

(a) the sum of $675.12 represented by check no. 1288 drawn on the account of Chem-Dyne for wages, which check was not honored as the result of defendant's stop payment order;

(b) compensation in an undetermined amount for services rendered by plaintiff William Lee Kovacs to defendant from the date of the order of the Butler County Court of Common Pleas appointing defendant as receiver until February 12, 1980;

(c) variety of technical and personal books, manuscripts and other documents belonging to plaintiff William Lee Kovacs.

6. Defendant has refused to deliver to plaintiff the above enumerated items belonging to plaintiff and the estate of William Lee Kovacs notwithstanding plaintiff's repeated demands for their return.

COUNT II

7. At the time plaintiff filed his petition for relief under the United States Bankruptcy Act, defendant was in possession of various documents required by plaintiff William Lee Kovacs in order to properly prepare his schedules required for his bankruptcy proceeding and, additionally, required by plaintiff William Lee Kovacs for the proper preparation of local, state and federal tax returns, including the following:

(a) a list of all generators of chemical waste located at the Chem-Dyne facilities at 500 Ford Boulevard, Hamilton, Ohio;

(b) a list of all creditors of William Lee Kovacs, Hamilton Industrial Real Estate Company, B & W Enterprises, Whitco Enterprises, Inc., and all other corporations and business entities which had been placed under the receivership of defendant;

(c) copies of financial statements previously provided defendant by plaintiff William Lee Kovacs;

(d) copies of all leases, contracts and other documents evidencing obligations or rights for any of the partnerships, corporations, or William Lee Kovacs, personally, which were placed under the receivership of defendant;

(e) documents concerning all accounts receivable for the partnerships, corporations and personal accounts of William Lee Kovacs, which entities were under the receivership of defendant;

(f) federal Form K-I for all entities covered by the receivership for all years since the date of the defendant's appointment.

8. At the time plaintiff filed his petition for relief under the United States Bankruptcy Act, defendant was in possession of various documents of title of property owned by plaintiff William Lee Kovacs, including titles to real estate and a motorcycle owned by plaintiff William Lee Kovacs.

9. Defendant has refused to provide plaintiff William Lee Kovacs access to or possession of the above referenced documents notwithstanding plaintiff's repeated demands for the same.

COUNT III

10. At the date defendant took over the assets of the various entities for which he was appointed receiver, he took possession of various items of property belonging to plaintiff Myrna Kovacs, including the following:

(a) the assets of Whitco Enterprises, Inc., a corporation wholly owned by plaintiff Myrna Kovacs, which corporation was, by opinion dated October 28, 1981, of the Court of Appeals for the Twelfth Appellate District of Ohio, Butler County, Ohio, improperly and unlawfully included in the receivership;

(b) a desk located on the premises with an approximate value of $1,200.00

(c) wages evidenced by two different checks issued to plaintiff Myrna Kovacs, which checks were not honored due to the stop payment order of defendant Jack A. Zettler and which checks totalled the approximate amount of $120.00;

(d) various documents required to be used by plaintiff Myrna Kovacs in preparing her tax returns, all as alleged in paragraph 7 above.

11. Defendant has refused to provide plaintiff Myrna Kovacs access to or possession of the above referenced documents notwithstanding plaintiff's repeated demands for the same.

WHEREFORE, plaintiffs demand judgment as follows:

(a) on Count I, an order requiring defendant to turnover unto plaintiff the following items: The sum of $675.12 representing wages due plaintiff William Lee Kovacs represented by check No. 1288 drawn on the account of Chem-Dyne, which check was not honored as a result of defendant's stop payment order, compensation in an undetermined amount for services rendered by plaintiff William Lee Kovacs to defendant from the date of the order of the Butler County Court of Common Pleas appointing defendant as receiver until February 12, 1980, and all technical and personal books, manuscripts and other documents belonging to plaintiff William Lee Kovacs;

(b) an order requiring defendant to grant plaintiff William Lee Kovacs access to or possession of all documents enumerated in Count II of the complaint;

(c) an order requiring defendant to turnover to plaintiff Myrna Kovacs the desk and amount of wages

enumerated in Count III of the complaint and to provide an accounting to plaintiff Myrna Kovacs of all assets of Whitco Enterprises, Inc., and to turnover all said assets, or the proceeds from any sale of said assets, to plaintiff, Myrna Kovacs;

(d) for an order granting plaintiffs interest from the date of February 4, 1980, on all monetary items requested to be turnovered to plaintiffs by defendant, for attorney's fees, and for such other relief to which plaintiffs are entitled.

Dated: November 8, 1982.

WOOD, LAMPING, SLUTZ & RECKMAN

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APPENDIX J

ADDITIONAL RELEVANT PROVISIONS OF THE BANKRUPTCY REFORM ACT OF 1978

11 U.S.C. Section 101

In this title

* * *

(4) "claim" means

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;

* * *

(11) "debt" means liability on a claim;

* * *

11 U.S.C. Section 727

* * *

(b) Except as provided in section 523 of this title, a discharge under subsection (a) of

this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title and whether or not a claim based on any such debt or liability is allowed under section 502 of this title.

* * *